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Supreme Court, U.S.
FILED

No. 09-22 JUN 25 2009

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

FREDERICK JELOVSEK, PETITIONER

v.

PHIL BREDESEN, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TENNESSEE; PAUL SUMMERS, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF TENNESSEE; SHARI ELKS, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR, TENNESSEE ALCOHOLIC BEVERAGE COMMISSION; WINE AND SPIRITS WHOLESALERS OF TENNESSEE; S. L. THOMAS FAMILY WINERY, INC. DBA THOMAS FAMILY WINERY; MARTIN REDDISH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sixth Circuit held that Tennessee's three-tier alcohol distribution laws requiring in-state residency to obtain a wholesale or retail license, prohibiting Petitioner from receiving wine by direct shipment from out-of-state retail vendors, and subjecting the Petitioner to criminal liability for the transport or possession of wine purchased out-of-state are immune from direct challenge on Commerce Clause grounds. This holding is contrary to the precedent of this Court as well as to the precedent of other circuits.

The Petitioner asks this Court to grant this Petition for a Writ of Certiorari, to reverse the Sixth Circuit's holding that the challenged laws are immune from Commerce Clause challenge, and to strike down the laws that are discriminatory on their face or in-effect and that violate his right of equal access to the interstate wine market under the Commerce Clause.

The questions presented are:

I. Whether discriminatory and protectionist laws in Tennessee's three-tier alcohol distribution system are immune from challenge on Commerce Clause grounds, contrary to the law of this Court and other circuits?

II. Whether the Sixth Circuit erred in failing to strike down the following provisions of state laws in violation of the Petitioner's right of equal access to the interstate wine market as protected by the Commerce Clause:

A. The laws that require in-state residency and presence to obtain a Tennessee wholesale or retail alcohol license, which laws restrict the Petitioner's access to a wide variety of wines offered by out-of-state vendors.

B. The law that prohibits direct shipment of wine to the Petitioner from out-of-state retailers, when the State allows him to purchase as much wine as he wants from in-state retailers.

C. The law that criminalizes the Petitioner's possession of wines purchased from out-of-state retail venders upon which Tennessee taxes have not been paid, when there is no mechanism to pay such taxes.

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The opinion of the United States Court of Appeals for the Sixth Circuit is reported at Jelovsek v. Bredesen, 545 F.3d 431 (6th Cir. 2008) (1a) The court's order denying the Petitioner's request for rehearing *en banc* is not reported. (43a) The District Court's opinion is reported at Jelovsek v. Bredsen (sic), 482 F. Supp. 2d 1013 (E.D. Tenn 2007) (20a).

JURISDICTION

On October 24, 2008, the Sixth Circuit held that provisions of Tennessee's winery law (Tenn. Code Ann. § 57-3-207) were unconstitutional under Commerce Clause scrutiny. The court vacated the district court's order to the contrary as to those laws, and remanded for further proceedings, which laws are not the subject of this Petition.

In the same decision, the Sixth Circuit affirmed the district court's dismissal of his claims as to other challenged laws. The Petitioner requested a rehearing *en banc* as to these laws, which request was denied on January 26, 2009. The Petitioner's application for an extension of time to file a Petition for a Writ of Certiorari regarding the laws that were not remanded was granted by Justice Stevens on April 22, 2009, giving Petitioner until and including June 25, 2009 to file this Petition.

This Court has jurisdiction to review the Sixth Circuit's decision pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

(see appendix)

STATEMENT

On June 28, 2005, Petitioner Jelovsek filed suit in the United States District Court for the Eastern District of Tennessee at Greeneville against the defendant state officials. The Complaint alleged that certain provisions of Tennessee statutes were discriminatory on their face or in effect, and that the laws, alone or in conjunction, violated his right of equal access to the interstate wine market as protected by the dormant Commerce Clause of the United States Constitution.

The Petitioner's claims, taken as true on the district court's dismissal pursuant to Fed. R. Civ. Proc. 12(b)(6), included: Tennessee law allows Mr. Jelovsek to purchase unlimited quantities of wine as long as it is purchased through Tennessee licensed wholesalers and retailers. Mr. Jelovsek desires to purchase wines for his own consumption that are not available to him through these in-state vendors or that are available only at substantially more cost than from an out-of-state retailer. His choice of wine is limited by the challenged state laws to wines chosen by a small group of twenty or so Tennessee wholesalers who have complete control over what wines to which he has access within the state. The challenged state laws protect in-state wholesalers and retailers from out-of-state competition by requiring in-state residency and locales to obtain the respective licenses. These residency requirements, alone and in conjunction with the other challenged laws,

severely restrict Mr. Jelovsek's access to a wide variety of wines that are available in the out-of-state wine market. In the absence of the challenged residency requirements, out-of-state vendors would obtain licenses, collect and submit the appropriate taxes, and the Petitioner's access to the wines of his choice would be vastly improved. Likewise, the Tennessee law that prohibits direct shipping of wines from out-of-state retail vendors prevents any meaningful access to the wines of his choice in the interstate market without the burden and expense of travel. Even then, under another challenged law, he can return home with only one gallon of wine or risk criminal liability because there is no mechanism to pay the state taxes.

On July 26, 2005, the State Defendants filed a motion to dismiss Mr. Jelovsek's complaint for failure to state a claim pursuant to Fed. R. Civ. Proc. 12(b)(6) and for lack of standing. Following a hearing, U.S. District Court Judge Ronnie Greer denied the State's motion on June 16, 2006 and the case continued forward with the State's Answer and scheduling.

In the meantime, on December 30, 2005, the S.L. Thomas Family Winery, Inc. et al. filed a complaint against the same state defendants in the Middle District of Tennessee challenging the constitutionality of the same winery and shipping statutes. Both the Plaintiffs and the State in that case filed motions for judgment on the pleadings which were pending on October 10, 2006 when the case was transferred by that court to the Eastern District at Greeneville to be consolidated with the Jelovsek case.

On August 21, 2006, prior to this transference, the Wine & Spirits Wholesalers of Tennessee had filed a Motion to Intervene in each of the respective cases,

which motions were heard and granted by Magistrate Inman in Greeneville on October 17, 2006.

On February 9, 2007, the Intervenor Wholesalers filed a Motion for Judgment on the Pleadings in the Thomas Family Winery case. On February 12, 2007, the consolidated cases were transferred *sua sponte* by Chief Judge Curtis Collier to the Eastern District of Tennessee at Chattanooga. On March 30, 2007, without a hearing, Judge Collier granted the State's Motion for Judgment on the Pleadings that was pending in the Thomas Family Winery case and denied Thomas Family Winery's pending motion. In the same order, the district court dismissed Plaintiff Jelovsek's claims *sua sponte*, despite the prior inapposite holding by Judge Greer in Greeneville.

The plaintiffs in both cases filed separate notices of appeal, which appeals were consolidated and heard by the Sixth Circuit on April 29, 2008. On October 24, 2008, the Sixth Circuit held that challenged provisions of Tennessee's Grape and Wine Law (Tenn. Code Ann. § 57-3-207) were facially discriminatory, including the requirement of residency in order to obtain a winery license, and the law allowing in-state wineries to bypass the three-tier system and sell up to five gallons of wine a day directly to a consumer. The Sixth Circuit vacated the district court's judgment and remanded to the district court for further proceedings as to those laws.

As to the other challenged laws, the Sixth Circuit upheld Tenn. Code Ann. § 57-3-402 on the reasoning that the law prohibited all shipping and thus "applies equally" to both in-state and out-of-state "wineries." The Sixth Circuit did not address Mr. Jelovsek's claims that § 57-3-402 is discriminatory in

effect as well as on its face, is protectionist of in-state vendors, or that it violates his right of equal access to the interstate wine market. The court disposed of these claims, the challenges to the in-state residency requirements, and the law imposing criminal liability for possession of wine purchased out-of-state, by simply holding that the three-tier alcohol distribution system "is immune from direct challenge on Commerce Clause grounds." Jelovsek, 545 F. 3d 431, 436.

On November 7, 2008, Plaintiff Jelovsek filed a Petition for Rehearing and Rehearing *En Banc* asking the court to address his claims as to these laws that were held to be immune. The Sixth Circuit denied the Petitioner's petition for rehearing on January 26, 2009.[1]

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[1] In response to the Sixth Circuit's decision regarding the winery laws, in June 2009 the Tennessee legislature passed a new law that removes in-state residency requirements to obtain a winery license, and a new law that allows out-of-state wineries to obtain a permit to ship a small quantity of wine directly to Tennessee consumers. It is likely that the remanded issues as to the winery laws will soon be dismissed as moot with the agreement of the parties. Unfortunately, these changes in the winery laws do not cure the unconstitutional effects of the remaining challenged laws that are at issue in this Petition. Of note is that the new legislation easily could have remedied these effects, as the original version of the shipping bill provided that out-of-state wholesalers and retailers as well as wineries could obtain the shipping permits. However, the bill was amended at the last minute to delete wholesalers and retailers, so the final enacted law allows only out-of-state wineries to obtain the permit.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's holding that the challenged laws are immune from Commerce Clause Challenge is contrary to the clear precedent of this Court. The holding is likewise contrary to the holdings of other circuits, thereby creating a split in the circuits.

The only authority the Sixth Circuit cites for its holding is this Court's statement that "'[s]tates may . . . funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is 'unquestionably legitimate.'" Jelovsek, 545 F.3d at 436, (quoting Granholm v. Heald, 544 U.S. 460, 489 (2005))(quoting North Dakota v. United States, 495 U.S. 423, 432 (1990)).

Granholm does not support the Sixth Circuit's holding. In Granholm, this Court found provisions in Michigan and New York's three-tier systems to be facially unconstitutional on Commerce Clause grounds, including a similar in-state presence requirement. The Court reiterated that the Twenty-first Amendment which gives States authority to pass such alcohol distribution laws does not "give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time." Granholm, 544 U.S. at 484-485. Likewise, twenty-five years ago, the Court stated "[i]t is by now clear that the [Twenty-first] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 275 (1984).

Neither the State nor the Intervenors have even attempted to suggest, as they cannot, that Tennessee's

in-state residency requirements are not discriminatory on their face or in effect, or that they further the core concern of the Twenty-first Amendment, i.e., combating the evils of unrestricted traffic in alcohol. The State allows Mr. Jelovsek to purchase and consume unlimited quantities of alcohol as long as it is purchased through these in-state vendors. Likewise, the only mechanism for Mr. Jelovsek to pay the required state taxes on alcohol and thus avoid criminal liability is to purchase wine through these in-state resident vendors. These facially discriminatory laws, alone, and along with the prohibition against direct shipping, offer blatant economic protectionism to in-state wholesalers and retailers and prohibit out-of-state wholesalers and retailers from reaching the in-state market. Even if there is an argument that the residency requirements and other protectionist laws promote a legitimate goal of the Twenty-first Amendment, unless the State can establish that the goal cannot be met in a less discriminatory manner, the laws are invalid. "This is so despite the fact that the law regulates the sale of alcoholic beverages, since its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." Healy v. Beer Institute, Inc., 491 U.S. 324, 344 (1989) (Justice Scalia, concurring).

On their face and in effect, the challenged laws protect in-state wholesalers' and retailers' economic interests and eliminate competition from out-of-state vendors. This Court has long held that such an end of protecting in-state business interests from competition is precluded by the Commerce Clause. *See* H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 542 (1949). And as the Court found in Granholm, "[t]he mere fact of non-

residency should not foreclose a producer in one state from access to markets in other states." Granholm, 544 U.S. at 472. Finally, as stated by Justice Brennan in North Dakota v. United States, this Court has "never held that any regulation with the avowed purpose ["of discouraging and policing unlawful diversion of liquor into it's domestic market]" is insulated from review under the federal immunity doctrine or any other constitutional ground, including the Commerce Clause." 495 U.S. at 450, (Justice Brennan, concurring and dissenting, joined by Justices Marshall, Blackmun, and Kennedy.)

The Sixth Circuit's holding is against the precedent of this Court, including Granholm, the very case it cites as authority.

The Sixth Circuit's holding is also inapposite to the decisions of other circuits. Squarely on point, in Cooper v. McBeath, 11 F.3d 547 (5th Cir. 1994), the Fifth Circuit addressed the issue of residency requirements for a liquor permit, and held that the Texas Alcohol Beverage Code's durational and residency requirements "amount to simple economic protectionism and therefore run afoul of the Commerce Clause. Moreover, the Twenty-first Amendment provides no sanctuary for these parochial statutes." 11 F.3d at 548. Again in Dickerson v. Bailey, 336 F.3d 388 (5th Cir. 2003), in a challenge to provisions of the Texas Alcohol Beverage Code, the Fifth Circuit recognized that '[u]nder controlling precedent in this circuit and in the Supreme Court, we are required to assess first whether these statutes violate the Commerce Clause, and, if we so determine, we must then ask whether they are saved by § 2 of the Twenty-First Amendment." 336 F.3d at 394.

In Brooks v. Vassar, 462 F.3d 341 (4th Cir. 2006), the Fourth Circuit directly addressed the merits of facial challenges under the dormant Commerce Clause to various aspects of Virginia's three-tier system. The court found that the part of the law allowing in-state producers to bypass the three-tier structure but not out-of-state producers had become moot by legislative action, but affirmed that the Plaintiffs were prevailing parties in the Commerce Clause challenge to that law. Likewise in Bainbridge v. Turner, 311 F. 3d 1104 (11th Cir. 2002), the Eleventh Circuit addressed a Commerce Clause challenge to the in-state exceptions to shipping prohibitions contained within Florida's "elaborate" three-tier system, holding that the exceptions were facially discriminatory.

The Petitioner respectfully submits that this Court should grant his Petition for a Writ of Certiorari to correct the Sixth Circuit's misinterpretation of this Court's precedent on this important constitutional issue, and to resolve the split in the circuits created by this case.

II. The Sixth Circuit erred in failing to strike down the following challenged statutes as discriminatory on their face or in effect, and in violation of the Petitioner's right of equal access to the interstate wine market as protected by the Commerce Clause.

A. Provisions of Tenn. Code Ann. § 57-3-203(b), (f), (g), and (h) and Tenn. Code Ann. §§ 57-3-204(b)(2) and (3) require in-state residency and in-state presence in order to obtain wholesale and retail licenses to sell and distribute alcohol within the state. (46a-48a) These provisions severely limit the Petitioner's choice of

wines to primarily mass-produced wines chosen by a small group of some twenty Tennessee wholesalers for their highest profit margin. The laws facially and in effect prevent participation and competition of out-of-state vendors in favor of in-state wholesalers and retailers. Obviously removal of the discriminatory residency and locale requirements to allow out-of-state wholesalers and retailers to obtain licenses would drastically improve the Petitioner's access to wines of his choice available in the interstate market.[2]

B. Tenn. Code Ann. § 57-3-402 (51a) prohibits direct shipment of wine to Tennessee consumers. This statute effectively denies the Petitioner any access to the interstate market except on infrequent occasions and with the additional burden and expense of travel. In contrast, the Petitioner is allowed easy and unlimited access to alcohol in the in-state market.

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[2] On cursory review, it appears that while most states have a one, two or three-tier alcohol distribution system, only a minority of states have these discriminatory residency requirements, or if they do, most states have some other exception or provision allowing out-of state retailers or wholesalers or at least such corporate entity to obtain a permit or license, or offer a direct shipping permit to retail vendors, or otherwise just do not restrict direct shipping to consumers. While not claiming to be all-inclusive on this quick review, it appears that Kansas, Kentucky, Oklahoma, Maryland, Mississippi, Missouri, Nevada, Texas, and Vermont join Tennessee in requiring strict in-state residency for all individual and/or corporate wholesale or retail licenses without offering some kind of exception or shipping permit that would allow out-of-state retailers to reach the in-state consumers and vice versa.

Tenn. Code Ann. § 57-3-402 is discriminatory in effect as well as on its face. Except for the closest retailers in neighboring states, out-of-state retailers would likely not go to the trouble and expense of applying for an in-state retail license even if the residency requirements were lifted, as the wine could not be shipped to the customer. The law is discriminatory in-effect and on its face as it excludes, as a practical matter, most out-of-state retailers from the Tennessee consumer market. See Vance v. W.A. Vandercook Co., 170 U.S. 438, 455 (1898) quoted *infra*. Also, the law does not in any way further the core concern of the Twenty-first Amendment of promoting temperance, as the Petitioner is allowed to buy and drink as much alcohol as he wants from an in-state retailer. The law on its face offers economic protectionism to in-state retailers who do not need to ship to reach the Tennessee market.

C. Tenn. Code Ann. § 57-3-401 (50a) subjects the Petitioner to felony charges if he brings into the state more than one gallon of wine purchased from an out-of-state retailer, or possesses at any one time more than three gallons of wine purchased from an out-of-state retailer, upon which the proper taxes have not been paid. However, the state offers no mechanism for the Petitioner to pay taxes on wine purchased out-of-state. This law on its face and in effect denies the Petitioner any access to the out-of-state wine market except for a very small quantity at any one time with the expense and burden of travel. Obviously it does nothing to promote the core concern of the Twenty-first Amendment of temperance as the Petitioner can drink all he wants of wine purchased in-state. Likewise, any

argument that this law is necessary for the collection of taxes or tax revenue is simply an excuse to continue the economic protectionism of in-state wholesalers and retailers. As found by this Court in Granholm, there are non-discriminatory means in which a state can collect the proper taxes. Like some thirty-five or more other states, Tennessee could offer a permit to out-of-state retailers to sell and ship wine to Tennessee residents and the retailer would collect and pay the taxes to the State. Or the State could simply offer a place for the consumer to self-report and send taxes on wine purchased from out-of-state retailers.[3]

The above challenged laws are discriminatory on their face or in-effect, or both, and all offer blatant protectionism of in-state wholesalers and retailers. The precedent of this Court establishes that if a state chooses to allow the sale and consumption of wine within its borders, a consumer such as the Petitioner has a right to access the interstate wine market on reasonably equal terms as he is allowed access to the in-state market, which necessarily includes shipping from out-of-state. Furthermore, in Granholm, the Court reiterated the long line of cases that support that the

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[3] See Tennessee General Assembly Fiscal review Committee, Fiscal Note, SB 166-HB 1155, dated March 26, 2009 (App 56a) finding a projected increase of nearly ten million dollars per year in state revenue plus an additional over two million dollar increase in local revenues based on the original direct shipping bill that included permits for wholesalers, retailers and wineries. The Tennessee legislature's amendment of the bill to exclude retailers and wholesalers from obtaining the shipping permit was against the clear fiscal interest of significantly increased revenue to the State, further evidence of the protectionist purpose of retaining the challenged laws.

Commerce Clause affords residents of one state the right to sell and ship intoxicating liquors to residents of another state, and residents of that state the right to receive the same:

In Leisy v. Hardin, 135 U.S. 100 (1890), the Court struck down an Iowa statute that prohibited the sale and direct shipment of intoxicating liquors to residents of that state except under a state-issued license. The Court recognized that intoxicating liquor was a commodity having a right of traffic in commerce like any other commodity. The Court held that in the absence of an act of Congress, a state could not prohibit the importation of intoxicating liquors from abroad or from a sister state.

Congress responded by passing the Wilson Act, 27 U.S.C. § 121. (53a) The Court subsequently made it clear that the police power granted by the Wilson Act did not abrogate an individual's rights under the Commerce Clause to receive and possess intoxicating liquors by direct shipment from out-of-state vendors if the state otherwise allowed the sale of liquors within that state. The Court held unequivocally that

> when a State recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in and importing them from other states; that such legislation is void, as a hindrance to interstate commerce, and an unjust preference of the products of the enacting State as against similar products of other States.

Scott v. Donald, 165 U.S. 58, 101 (1896). The Court

held that the South Carolina law prohibiting direct shipping of alcohol was unconstitutional, stating that

> those citizens who wish to use foreign wines and liquors are deprived of the exercise of their own judgment and taste in the selection of commodities. . . . It is not a law purporting to forbid the importation, manufacture, sale and use of intoxicating liquors as detrimental to the welfare of the state or the health of the inhabitants, and hence it is not within the scope and operation of the act of Congress of August, 1890. That law was not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce. . . . Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid.

Scott, 165 U.S. at 100.

In response, the South Carolina legislature amended its statute to acknowledge the constitutional right of a resident to receive liquors for his own use from out-of-state vendors by direct shipment, but injected certain regulations and restrictions. On subsequent review, these regulations and restrictions were also struck down by the Court, holding

> [t]he regulation . . . compels the resident of the

> state who desires to order for his own use to first communicate his purpose to a state chemist. It, moreover, deprives any nonresident of the right to ship, by means of interstate commerce, any liquor into South Carolina, unless previous authority is obtained from the officers of the state of South Carolina. **On the face of these regulations, it is clear that they subject the constitutional right of the nonresident to ship into the state, and of the resident in the state to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges.**

Vance v. W.A. Vandercook Co., 170 U.S. at 455 (emphasis added). The Court again rejected the State's argument that the regulations and restrictions constituted an "inspection law" to determine the purity of the product, finding the argument to be unsound as the inspection of a sample in advance was not "in the slightest degree" an inspection of the goods subsequently shipped. *Id.* at 456. However, the Court did uphold as valid under the Wilson Act that part of the amended statute that prohibited the direct shipment and receipt of liquors *for resale* within the state unless the liquor passed through designated state officers. Thus the Court recognized a difference between importation for resale and importation for personal use, stating

> it is clear that [the law], to be valid, must not substantially hamper or burden the constitutional right, on the one hand, to make,

> and, on the other, to receive, such shipment. . . . The power of the state to inspect an article protected by the guarantees of the constitution, because intended only for use, and which cannot be sold, is, in the nature of things, restrained by limitations arising from the constitutional provisions of a more restricted nature than would be the power to inspect articles intended for sale within the state. The greater harm and abuse which might arise in the latter case suggests a wider power than is incident to the other.

Id. at 456 .

Congress next passed the Webb-Kenyon Act, 27 U.S.C. § 122. (46a) This Act specifically authorized states to forbid shipments of alcohol to consumers within the state for personal use. Even under the specific language of this Act, half the members of an equally divided Supreme Court voted to strike a West Virginia law that prohibited direct shipping to consumers within that State as a violation of the Commerce Clause. The only thing that saved the West Virginia law from being struck down was that the other half of the Court believed it survived Commerce Clause challenge because (unlike Tennessee) West Virginia strictly prohibited *all* alcohol within the state for whatever purpose. Clark Distilling Co. v. Western Maryland R.R. Co., 242 U.S. 311, 321-322 (1917).

In 1919, the Eighteenth Amendment established nationwide Prohibition that was finally repealed in 1933 by the Twenty-First Amendment, which Amendment closely followed the wording of the Wilson and Webb-Kenyon Acts, "'expressing the framers' clear intention

of constitutionalizing the Commerce Clause framework established under those statutes.'" Granholm, 544 U.S. at 484, quoting Craig v. Boren, 429 U.S. 190, 205-206(1976).

This long line of cases establishes that Tennessee could prohibit all alcohol within the state, in which case Tenn. Code Ann. § 57-3-402 would likely be upheld as a valid exercise of the State's authority under the Twenty-first Amendment. However, Tennessee does not prohibit all alcohol within the State, but rather allows persons of age to purchase, consume, transport and possess unlimited amounts of alcohol as long as it is obtained through in-state licensed wholesalers and retailers who are protected economically from out-of-state competition by the prohibition against direct shipping from out-of-state vendors.

As stated by this Court in Granholm,

> [a] State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective.

Granholm, 544 U.S. at 488-489. As held by the Court over 100 years ago in Vance, the law prohibiting the direct shipment of out-of-state wine to the Petitioner is repugnant, on its face, to the Commerce Clause. See Vance, 170 U.S. at 455.

CONCLUSION

The Petitioner respectfully submits that this Court should grant this Petition for a Writ of Certiorari to correct the Sixth Circuit's misinterpretation and

misapplication of this Court's precedent, to resolve the split within the circuit's on this important constitutional issue, and to uphold the Petitioner's and all consumers' important constitutional rights under the Commerce Clause. The Court's resolution of these issues is of utmost importance to all American citizens.

Respectfully submitted,

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(any footnotes trail end of each document)

Nos. 07-5443/5524

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FREDERICK JELOVSEK (07-5443); S.L. THOMAS FAMILY WINERY, INC. dba Thomas Family Winery; MARTIN REDDISH (07-5524),
Plaintiffs-Appellants,

v.

PHIL BREDESEN, in his official capacity as Governor of the State of Tennessee; PAUL SUMMERS, in his official capacity as Attorney General of the State of Tennessee; SHARI ELKS, in her official capacity as Executive Director, Tennessee Alcoholic Beverage Commission,
Defendants - Appellees,

WINE AND SPIRITS WHOLESALERS OF TENNESSEE,
Intervening Defendant - Appellee.

April 29, 2008, Argued

October 24, 2008, Decided

October 24, 2008, Filed

Appeal from the United States District Court for the Eastern District of Tennessee at Greeneville. Nos. 05-00181; 06-00149--Curtis L. Collier, Chief District Judge.

COUNSEL: ARGUED: Sandra B. Jelovsek, Johnson City, Tennessee, James A. Tanford, INDIANA UNIVERSITY SCHOOL OF LAW, Bloomington, Indiana, for Appellants.

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ON BRIEF: Sandra B. Jelovsek, Johnson City, Tennessee, James A. Tanford, INDIANA UNIVERSITY SCHOOL OF LAW, Bloomington, Indiana, for Appellants.

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Carter G. Phillips, SIDLEY AUSTIN, Washington, D.C., for Amici Curiae.

JUDGES: Before: NORRIS, GIBBONS, and GRIFFIN, Circuit Judges.

OPINION

ALAN E. NORRIS, Circuit Judge. These consolidated cases ask the question whether Tennessee laws governing the wine industry violate the dormant commerce clause of the Constitution. This is one of several lawsuits filed across the country after the Supreme Court invalidated wine-related laws in Michigan and New York which allowed only in-state wineries to sell and ship wine directly to consumers. *Granholm v. Heald*, 544 U.S. 460, 125 S. Ct. 1885, 161 L. Ed. 2d 796 (2005).

The plaintiffs-appellants include Tennessee residents Frederick Jelovsek and Martin Reddish, individual oenophiles who would like better access to wine produced outside of Tennessee, and a winery based in the state of Indiana, S.L. Thomas Family Winery, Inc., which would like to sell directly to Tennessee residents. Plaintiffs sued the Governor, Attorney General, and Executive Director of the Tennessee Alcoholic Beverage Commission, in their official capacities. In addition, the Wine and Spirits Wholesalers of Tennessee ("WSWT") successfully intervened as a defendant. For convenience sake, as the Court did in *Granholm*, the appellants will collectively be referred to as "the wineries," unless distinguishing them is appropriate, and the appellees will be referred to as "the state."

The district court granted defendants' Fed. R. Civ. P. 12(c) motion for judgment on the pleadings. *Jelovsek v. Bresden*, 482 F. Supp. 2d 1013, 1023 (E.D. Tenn. 2007).[1] The district court concluded that since both in- and out-of-state wineries are prohibited from selling and

shipping wine directly to Tennessee consumers, this case is distinguishable from *Granholm*. The invalidated laws in *Granholm* denied only out-of-state wineries the ability to ship to consumers, a disparate treatment that the Supreme Court ruled unconstitutional.

We agree with the district court that the Tennessee shipping restrictions are distinguishable from those struck down in *Granholm* and affirm the district court's judgment as to the Tennessee ban on the direct shipment of alcohol to consumers, including wine. However, the wineries make a broader challenge to the Tennessee regulatory scheme for alcohol, specifically wine. As discussed below, we conclude that certain other challenged laws are discriminatory on their face, and thus vacate the district court judgment as to those laws, and remand for further proceedings.

I.

Tennessee employs what is commonly referred to as a three-tier system of alcohol regulation. The Tennessee Alcoholic Beverage Commission ("TABC") issues separate classes of licenses to manufacturers and distillers, wholesalers, and liquor retailers. Tenn. Code Ann. § 57-3-201. Unlicensed sales of alcohol are not permitted. *Id.* § 404(a). Manufacturers are limited to selling to wholesalers; wholesalers may sell to retailers, or in some cases other wholesalers; consumers are required to buy only from retailers. *Id.* § 404(b)-(d).

Statutes curtail the importation of alcoholic beverages, including wine, into the state, as well as the transportation of alcoholic beverages by individuals who are not licensees. These statutes seem to

contradict each other, which creates a confusing web of seemingly applicable laws, and in its briefing and argument to the court the state did little to unravel the mystery.[2] The district court found, and the state concedes, that a Tennessee resident may transport a greater quantity of wine purchased from a Tennessee winery as compared to wine purchased in another state.

Tennessee wineries are also subject to the three-tier system, and have their own class of license. *Id.* § 201(4). However, wineries are subject to further regulation, as well as being afforded some exceptions from the general liquor control statutes, through Tennessee's Grape and Wine Law. *Id.* § 207. The Grape and Wine Law, *inter alia*, restricts winery licenses to individuals who have been Tennessee residents for at least two years, or to corporations whose stock is wholly owned by Tennessee residents of at least two years; and permits Tennessee wineries which use a sufficient percentage of Tennessee-grown grapes in their wine production to serve complimentary samples to patrons, and to sell at retail directly to customers without any additional license. *Id.* § 207(d), (f). The Grape and Wine Law also provides that, notwithstanding the transportation restrictions in other statutes, wine purchased at a Tennessee winery may be transported within the state of Tennessee. *Id.* § 207(i).

II.

"We review a district court's grant of a motion for judgment on the pleadings de novo." *Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC*, 477 F.3d 383, 389 (6th Cir. 2007) (citing *EEOC v. J.H. Routh Packing Co.*, 246 F.3d 850, 851 (6th Cir. 2001)). "The manner of

review under [Fed. R. Civ. P.] 12(c) is the same as a review under Rule 12(b)(6); we must 'construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief.'" *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 761 (6th Cir. 2006) (quoting *Grindstaff v. Green*, 133 F.3d 416, 421 (6th Cir. 1998)).

Plaintiffs allege that the challenged statutes impermissibly discriminate against out-of-state wineries, and favor in-state wineries, in violation of the Commerce Clause. The scope of the Commerce Clause, which grants the exclusive power to Congress to regulate interstate commerce, recently has been summarized by the Supreme Court:

> The Commerce Clause empowers Congress "[t]o regulate Commerce . . . among the several States," Art. I, § 8, cl. 3, and although its terms do not expressly restrain "the several States" in any way, we have sensed a negative implication in the provision since the early days, *see, e.g., Cooley v. Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 53 U.S. 299, 12 How. 299, 318-319, 13 L. Ed. 996 (1852); *cf. Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 209, 6 L. Ed. 23 (1824) (Marshall, C. J.) (dictum). The modern law of what has come to be called the dormant Commerce Clause is driven by concern about "economic protectionism -- that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New*

Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-274, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988). The point is to "effectuat[e] the Framers' purpose to 'prevent a State from retreating into [the] economic isolation,'" *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330, 116 S. Ct. 848, 133 L. Ed. 2d 796 (1996) (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995); brackets omitted), "that had plagued relations among the Colonies and later among the States under the Articles of Confederation," *Hughes v. Oklahoma*, 441 U.S. 322, 325-326, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979).

. . . .

Under the resulting protocol for dormant Commerce Clause analysis, we ask whether a challenged law discriminates against interstate commerce. *See* Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore., 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994). A discriminatory law is "virtually per se invalid," *ibid.*; *see also* Philadelphia v. New Jersey, 437 U.S. 617, 624, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978), and will survive only if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," Oregon Waste Systems, supra, at 101, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (internal quotation marks omitted); *see also* Maine v. Taylor, 477 U.S. 131, 138, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986).

Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1808, 170 L. Ed. 2d 685 (2008).

Applying this constitutional principle to the regulation of alcohol at times has been problematic for courts, due in part to the existence of the Twenty-first Amendment to the Constitution, which repealed prohibition and grants broad authority to the states to regulate alcohol importation and distribution. There was a period following ratification of the Twenty-first Amendment when the states' power to regulate alcohol was thought to be virtually limitless.[3] However, more recent case law has concluded that "[t]he aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time." *Granholm*, 544 U.S. at 484-85. Similarly, "the Twenty-first Amendment . . . does not displace the rule that States may not give a discriminatory preference to their own producers." *Id.* at 486; *accord Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275-76, 104 S. Ct. 3049, 82 L. Ed. 2d 200(1984). A statute may be shown to violate the Commerce Clause based either upon its discriminatory purpose, or discriminatory effect. *Bacchus*, 468 U.S. at 270.

A. Direct Shipping and Tennessee's Three-Tier System

The Federal Trade Commission ("FTC") recently drafted a report strongly in favor of permitting online wine sales, and direct shipping from wineries to consumers. Federal Trade Commission, *Possible*

Anticompetitive Barriers to E-Commerce (2003), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf. In it, the FTC extolls the many benefits to consumers by allowing internet sales and direct shipping, including a much greater variety of wines available, and lower prices. *Id.* at 18-19. It also goes on to address the most common concerns with such programs, preventing underage drinking and collecting state tax revenue. *Id.* at 26-39.

Despite the FTC conclusion that states should allow the direct shipping of wine, Tennessee's refusal to do so presents no constitutional problem. The Commerce Clause does not require that states *optimize* commerce, only that "[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." *Granholm*, 544 U.S. at 493. As the district court noted, "[t]he logical corollary to evenhanded permissiveness is evenhanded restrictiveness -- a State may choose to ban direct shipment of wine." *Jelovsek*, 482 F. Supp. 2d at 1019. We agree and affirm the judgment of the district court with respect to upholding Tennessee's ban on direct shipment of alcoholic beverages, including wine, to consumers, as it applied equally to in-state and out-of-state wineries.

Likewise, Tennessee's decision to adhere to a three-tier distribution system is immune from direct challenge on Commerce Clause grounds. *See Granholm*, 544 U.S. at 489 ("States may . . . funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is 'unquestionably legitimate.'") (quoting *North Dakota v. United States*, 495 U.S. 423, 432, 110 S. Ct. 1986, 109 L. Ed. 2d 420 (1990)).

B. Grape and Wine Law

Turning to Tennessee's Grape and Wine Law, appellants assert that the state has already decided to eschew the three-tier system through the multitude of exceptions offered to Tennessee wineries as part of the Grape and Wine law, exceptions which impermissibly favor in-state economic interests.

The district court reasoned that purchasing wine at a winery in person "is different . . . from the convenience-oriented market that would be created and facilitated by a law allowing direct shipping." *Jelovsek*, 482 F. Supp. 2d at 1021. The court went on to rule that "[p]laintiffs have failed to demonstrate that the Grape and Wine Law discriminates against interstate commerce by practical effect," *id.*, and noted that the distinctions that *are* present "would have a *de minimis* impact on interstate commerce." *Id.* at 1021 n.8.

We discern two problems with the court's analysis. The first is that there is no *de minimis* exception when evaluating whether a law is discriminatory on its face. "Where [a] statute *regulates even-handedly* to effectuate a *legitimate local public interest*, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970) (citing Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960)) (emphasis added). However, only when a statute passes this initial scrutiny is a state afforded "a more flexible approach permitting inquiry into the balance between local

benefits and the burden on interstate commerce." Bacchus, 468 U.S. at 270 (citing Pike, 397 U.S. at 142). It is not appropriate to conclude that a statute regulates evenhandedly because its clear facial discrimination has only a *de minimis* effect on interstate commerce.

Second, while the district court focused on whether the Grape and Wine Law has the practical *effect* of discriminating in favor of in-state interests, it appears that the very *purpose* behind the Grape and Wine Law was to discriminate in favor of in-state wineries, especially those that use grapes grown in-state. "A finding that state legislation constitutes 'economic protectionism' may be made on the basis of . . . discriminatory purpose . . . ." *Id.* (citing *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 352-53, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)).

The parties, as well as the district court, spent a great deal of effort examining whether, and to what extent, *Granholm* applies to the cases before us. We believe *Bacchus* is also instructive in this case. In *Bacchus*, the state adopted a law favoring fruit wine produced from products grown in the state. *Bacchus*, 468 U.S. at 265. The legislature's stated purpose when enacting the law "was to encourage and promote the establishment of a new industry" and that granting benefits to "fruit wine manufactured in the State from products grown in the State was intended to help in stimulating the local fruit wine industry." *Id.* at 270-71 (citation omitted). Thus, the Court concluded that it "need not guess at the legislature's motivation, for it is undisputed that the purpose . . . was to aid [in-state] industry. Likewise, the effect . . . is clearly discriminatory, in that it applies

only to locally produced beverages . . . ." *Id.* at 271. The Court rejected the reasoning of the state supreme court that the low sales volume of the benefitted local wine meant those "products pose[d] no competitive threat to other liquors produced elsewhere and consumed in [state]." *Id.* at 269 (citation omitted).

Nor do we need to guess the legislature's purpose here. Included in the statement of purpose for Tennessee's Grape and Wine Law is the following:

> WHEREAS, It is recognized that development of an additional cash crop would *benefit the rural areas and the general economy of the State of Tennessee*; and
>
> WHEREAS, It appears that many areas of Tennessee are especially suitable for growing grapes but are unsuitable or less suitable for growing any other cash crops; and
>
> WHEREAS, Under existing law no persons have ever been licensed to operate a winery and stimulate grape growing in Tennessee by *providing an initial and minimum market for native grapes*;

1977 Tenn. Pub. Acts 255 (emphasis added).

This stated purpose is difficult to distinguish from the stated purpose of the law struck down in *Bacchus*. *Compare Bacchus*, 468 U.S. at 270 (stating the explicit purpose was to to benefit in-state industry). Another telling comparison between Tennessee's Grape and Wine Law and the tax exemption for locally-produced

alcohol law struck down in *Bacchus* is the following provision of the law:

> Wine produced in Tennessee from agricultural products produced in Tennessee shall be taxed at the same rate as wine produced out-of-state. It is hereby provided, however, that *should the United States Constitution*, as authoritatively interpreted by the final decision of a federal or Tennessee court, *permit a lesser tax to be imposed on wine produced in Tennessee from agricultural products produced in Tennessee than on wine produced out-of-state*, then there shall be levied a tax of five cents (5 cent(s)) per gallon on wine produced in Tennessee from agricultural products produced in Tennessee. Such *wine from Tennessee products shall then be exempt from all other alcoholic beverage taxes and fees.*

Tenn. Code Ann. § 57-3-207(l) (emphasis added). The constitutional caveat was added later; the original Act exempted in-state wine from all taxes save for the five-cent per-gallon tax. 1977 Tenn. Pub. Acts 256. We do not cite this particular provision as especially egregious in its current form, but rather as an illustration of the discriminatory intent behind passage of Tennessee's Grape and Wine Law and its similarity to the statute struck down in *Bacchus*. *Compare id. with Bacchus*, 468 U.S. at 265 (stating that the Hawaii statute at issue exempted locally produced fruit wine from the otherwise mandatory 20% excise tax).

Other provisions of the Grape and Wine Law are discriminatory on their face, and in their purpose. For

example, the Grape and Wine Law requires a two-year Tennessee residency before a winery license may be obtained and, if the applicant is a corporation, all of the capital stock must be owned by two-year Tennessee residents. Tenn. Code Ann. § 57-3-207(d). Only if 75% of the agricultural products used in producing its wine are grown in Tennessee may a Tennessee winery serve samples of the wine without charge at its facility, and sell wine at retail directly to consumers. *Id.* § 207(f). In addition, "any nonprofit association organized to encourage and support grape growing and winemaking in [Tennessee] with ten (10) or more Tennessee licensed wineries as members" is permitted to hold festivals and "transport, serve and offer complimentary samples" of Tennessee wine, *id.* § 207(o), and wineries using at least 75% agricultural products from Tennessee may "donate wine without charge to nonprofit religious, educational or charitable institutions or associations." *Id.* § 207(f)(5). Each of these provisions impermissibly favor Tennessee interests at the expense of interstate commerce.

The Thomas plaintiff in particular also complains that, under the Grape and Wine Law, consumers may lawfully transport "any amount [of wine] which the customer may legally purchase from a Tennessee licensed winery," *id.* § 207(i), while a consumer purchasing wine in person from an out-of-state winery appears to be prohibited from transporting the wine to his home in Tennessee. *Id.* § 402(a).

Finding that a law "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Supreme Court] has generally struck

down the statute without further inquiry." *Granholm*, 544 U.S. at 487 (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986)). Even so, as the *Granholm* Court did, a court must still "consider whether [the] state's regime 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Id.* at 489 (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 278, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988)).

In *Granholm*, the states advanced two obvious arguments--that the restriction on shipping helped keep alcoholic beverages out of the hands of minors and facilitated tax collection. *Id.* Both justifications were rejected, as the Court found nondiscriminatory alternatives existed to serve the states' proffered concerns. *Id.* at 490-93. The state in this cases has yet to offer justification for the challenged laws, but rather has steadfastly maintained that they are not discriminatory.

III.

Our conclusion that the Grape and Wine Law is facially discriminatory does not end the inquiry. We must decide what is to be done about it. The Grape and Wine Law does not act to directly burden out-of-state wineries, but rather to favor in-state wineries. Thus, striking the law as written or surgically excising offending provisions would, while remedying the constitutional infirmities, serve to hurt in-state Tennessee wineries, none of which are parties to this action. And, it would not benefit out-of-state wineries or any plaintiff in this case. The state defendant does

not express an opinion as to an appropriate remedy, while the intervening defendant WSWT argues in the alternative that if the scheme is found to be discriminatory, the appropriate remedy would be to strip the law's benefits from in-state wineries rather than extending direct-sale benefits to out-of-state wineries.

In support of their argument, WSWT cites *Beskind v. Easley*, 325 F.3d 506, 519 (4th Cir. 2003), for the proposition that "[the state] would wish us to take the course that least destroys the regulatory scheme that it has put into place pursuant to its powers under the Twenty-first Amendment." In *Beskind* the district court "declar[ed] unconstitutional the core statutes that prohibit such direct shipment and enjoin[ed] their enforcement." *Id.* at 517. The court of appeals upheld the district court's judgment that the law was unconstitutional, but reversed the remedy, noting that "it causes less disruption to [the state's alcoholic beverage] laws to strike the single provision . . . creating the local preference." *Id.* at 519.

The Fifth Circuit reached a different result. It noted that the "Supreme Court has held that 'when the right invoked is that of equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by *withdrawal of benefits* from the favored class as well as by *extension of benefits* to the excluded class.'" *Dickerson v. Bailey*, 336 F.3d 388, 407 (5th Cir. 2003) (quoting *Heckler v. Mathews*, 465 U.S. 728, 740, 104 S. Ct. 1387, 79 L. Ed. 2d 646 (1984)) (emphasis in original). The Fifth Circuit found the Supreme Court's remedy in *Bacchus* to be analogous, striking down the discriminatory tax on out-of-state

entities rather than extending the excise tax to in-state entities. *Id.* at 408. The court concluded that "it is not the function of litigants seeking redress for violations of their constitutional rights under the Commerce Clause to seek the imposition of affirmative burdens on other parties competing in the marketplace. The constitutional right the Plaintiffs here seek to protect is their right to participate in interstate commerce that is unimpeded by protectionist state policies." *Id.* at 408.

Both decisions are well reasoned, but neither is perfectly analogous to the cases before us. The district court acknowledged that "the record in this case is not as detailed as it could be." *Jelovsek*, 482 F. Supp. 2d at 1015. The court also found "the State's response to be particularly inadequate in addressing the more substantive issues as it . . . failed to provide a justification for Tennessee's alcoholic beverage restrictions." *Id.* at 1016 n.3. As a result, we conclude the best course of action is to remand the case to the district court for further consideration consistent with this opinion. The state should be afforded the opportunity to justify the facially discriminatory Grape and Wine Law as serving a legitimate local purpose and establish that no non-discriminatory alternatives exist. If the state is unable to do so, the court should devise a remedy that treats in-state and out-of-state wineries equally. In addition, because striking down the Grape and Wine Law would affect in-state wineries, it may be that they will wish to seek intervention on remand.

IV.

We affirm the district court's judgment upholding the Tennessee law banning the direct shipment of alcoholic

beverages to consumers, including wine. However, we conclude that Tennessee's Grape and Wine Law is discriminatory on its face. We therefore vacate the district court judgment to the contrary, and remand for further proceedings consistent with this opinion.

Footnotes

1It appears the Tennessee governor's name is misspelled in the style of the case. It is Phil Bredesen, not "Bresden."

2Tenn. Code Ann. § 57-3-401(a) prohibits the transportation or possession of more than three gallons of untaxed alcoholic beverage. Subsection (b) prohibits the importation, shipment, or delivery of untaxed alcoholic beverages in excess of one gallon. Elsewhere, there appears to be a flat ban on the importation or transportation of alcoholic beverages, unless destined for a Tennessee license holder. *See* Tenn. Code Ann. § 57-3-402(b) ("No common carrier or other person shall bring or carry into this state for delivery or use in this state any alcoholic beverages unless the same shall be consigned to a manufacturer or wholesaler duly licensed . . . ."); *id.* § 402(c) ("It is unlawful for any person, railroad company or other common carrier, to transport or accept delivery of alcoholic beverages, consigned to any person except those duly authorized and holding a wholesaler's license.").

3The Twenty-first Amendment states: "The transportation or importation into any State . . . of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. For a thorough discussion of the history and evolution of

jurisprudence as it relates to the tension between the dormant Commerce Clause and the Twenty-first Amendment, see *Granholm*, 544 U.S. at 476-87. *See also* Thomas E. Rutledge & Micah C. Daniels, *Who's Selling the Next Round: Wines, State Lines, the Twenty-first Amendment and the Commerce Clause*, 33 N. Ky. L. Rev 1, 8-22 (2006).

Filed 3/30/07
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

Case No. 2:05-CV-181 Chief Judge Curtis L. Collier

FREDERICK JELOVSEK,
Plaintiff,

V.

PHIL BRESDEN, PAUL SUMMERS, and SHARI ELKS,
Defendants,

and

WINE & SPIRITS WHOLESALERS OF TENNESSEE,
Intervenor.

Case No. 2:06-CV-149 Chief Judge Curtis L. Collier

S.L. THOMAS FAMILY WINERY, INC., d/b/a THOMAS FAMILY WINERY, and MARTIN REDISH,
Plaintiffs,

V.

PHIL BRESDEN, PAUL SUMMERS, and SHARI ELKS,
Defendants.

MEMORANDUM

I.INTRODUCTION AND PROCEDURAL HISTORY

Before the Court are two consolidated cases[1] challenging the State of Tennessee's statutory scheme for regulating wine licensing, distribution, and shipping. Tenn. Code Ann. §§ 57-32070(1), 303(e)(1), 402 & 404(a) & (c). Tennessee is one of a decreasing number of States which currently prohibit the direct shipment of wine from out-of-state wineries to in-state consumers. See Wine Inst., Direct Shipment Laws By State (as of Jan. 2007); Linda Greenhouse, Court Lifts Ban on Wine Shipping, N.Y. Times, May 17, 2005.

Plaintiffs Jelovsek and Redish are oenophiles who allege they would purchase wine directly from out-of-state wineries and have such wine shipped in-state, if the law permitted (Court File No. 1, Pars. 7-8). Plaintiff S.L. Thomas Family Winery, Inc., d/b/a Thomas Family Winery (collectively, "Plaintiffs") is an Indiana-based commercial winery which alleges it would ship wine directly to instate consumers (Case No. 2:06-CV-149, Court File No. 1). Plaintiffs bring their claim under 42 U.S.C. § 1983, and allege that Tennessee's Grape and Wine Law and laws prohibiting the shipping of alcoholic beverages deprive them of their rights under the Commerce Clause of the U.S. Constitution, art. I, § 8, cl. 3 (id. at Par. 1). Plaintiffs seek a declaratory judgment to such effect and an injunction against enforcement of these laws. Plaintiffs cite Granholm v. Heald, 544 U.S. 460 (2005), in support of this position. In Granholm, the United States Supreme Court overturned wine direct-shipping laws in Michigan and New York, finding such State laws impermissibly

burdened interstate commerce. Plaintiffs request the Court apply Granholm to overturn the "licensing, residency, payment of tax, direct shipping, criminal and civil penalties, and other prohibitive and discriminatory requirements of Tennessee laws pertaining to the direct sale and shipment of wine . . ." (Court File No. 1, p. 16).

Defendants are sued in their capacities as State officials (id. at Par. 18). The defendants include Tennessee's Governor, Attorney General, and the Executive Director of the Alcoholic Beverage Commission (the "Commission"), the agency charged with enforcing state liquor laws (id. at Pars. 14-18). The Court also granted the Intervenor petition (Court File No. 19) of Wine & Spirits Wholesalers of Tennessee ("WSWT"; collectively, "Defendants") (Court File No. 30). Defendants argue that Tennessee's wine licensing, distribution and shipping laws are constitutional because such laws are equally as restrictive on in-state wineries as they are on out-of-state wineries (Court File No. 17, p. 1-2). Defendants rely on the Twenty-First Amendment, which gives States great discretion in regulating alcoholic beverages, including wine (Court File No. 31, p. 10; No. 32, p. 5).

The Court has already denied (Court File No. 16) Defendant's prior motion to dismiss for lack of standing (Court File No. 7). The Court determined (1) Plaintiffs had standing to assert their claims and (2) Plaintiffs had sufficiently alleged a claim to avoid dismissal under Fed. R. Civ. P. 12(b)(6) (Court File No. 16, p. 5). The question currently before the Court, based on Plaintiff's complaint and the parties' cross-motions, is: are the challenged statutes facially discriminatory in favor of

in-state wineries and against out-of-state wineries. If so, following the analysis in Granholm the Court will need to ask whether Tennessee's laws are narrowly tailored to advance a legitimate local purpose.

Plaintiffs and the state officials filed cross-motions for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) (Case No. 2:06-CV-149, Court File Nos. 2 & 5). WSWT responded to both motions, asking the Court to deny both motions as premature (Court File No. 37, p. 2; hereinafter "WSWT Resp.").fn2WSWT would prefer to develop a full factual record; WSWT feels there is little development on the record as to the (1) impact of the challenged statutes on interstate commerce and (2) the "legitimate local purpose(s)" which underlie such statutes (id. at 7-9). Again, the Court must weigh the purpose behind the statutes against their impact on interstate commerce if the Court finds the statutes are facially discriminatory.

The Court fully agrees with WWST, the record in this case is not as detailed as it could be. The parties have failed to litigate a "full, fact-intensive Commerce Clause analysis." The Court did consider whether to require Plaintiffs and the State Defendants to supplement and support their motions.[3] However, after careful review of the motions and pleadings, the Court determined that the challenged statutes, in particular the Grape and Wine Law and the prohibition on the import and transport of alcoholic beverages such as wine, is constitutionally permissible. This case is factually and legally distinguishable from Granhohn. Therefore, the Court need not review the challenges statutes under strict scrutiny and has not required the parties to supplement the record.

By Order attached to this Memorandum, and for the reasons set forth below, this Court will GRANT Defendants' motion to dismiss (Court File No. 2).[4] Accordingly, the Court will DENY Plaintiffs' motion to dismiss (Court File No. 5), and will also DENY the request of WSWT to permit the case to go forward to discovery.

II. STANDARD OF REVIEW UNDER FED. R. CIV. P. 12(c)

The standard of review for a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings is the same standard of review as a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Grindstaff v. Green, 133 F.3d 416,421 (6th Cir. 1998); Morgan v. Church's Fried Chicken, 829 F.2d 10, 11 (6th Cir. 1987). The Court must (1) construe the complaint in the light most favorable to Plaintiff, (2) accept as true all factual allegations in the complaint, and (3) determine if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle [the plaintiff] to relief." Conley v. Gibson; 355 U.S. 41, 45-46 (1957); Tritent Int'l Corp. v. Kentucky, 467 F.3d 547, 553-54 (6th Cir. 2006); Bloch v. Ribar, 156 F.3d 673, 677 (6th Cir. 1998). The Court accepts factual allegations as true but is not required to accept legal conclusions or "unwarranted factual inferences." Tritent Int'l Corp., 467 F.3d at 544 (citations omitted); Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988).

III. BACKGROUND ON TENNESSEE'S REGULATION OF WINE

Like many States, Tennessee has established a three-

tiered system of required licenses to regulate the sale and distribution of wine and other alcoholic beverages. With reference to wine, the tiers include: (1) wineries, (2) wholesalers, and (3) retailers. Tenn. Code Ann. § 57-3-201. Wine is generally included in the definition of "alcoholic beverage," id. § 101(a)(1)(A), and is also governed specifically by the Grape and Wine Law, which permits the manufacture and bottling of "alcoholic vinous beverages," id. § 207(b). Winery licenses are restricted to Tennessee residents of two years or more or corporations owned by such residents. Id. § 207(c)-(d). Wineries are prohibited from selling directly to retailers, all alcoholic beverages must pass through wholesalers before reaching retailers and consumers. Id. § 404(a)-(c). The Grape and Wine Law does include one exception. Any winery whose wine is made using at least 75% Tennessee-grown agricultural products may, on the winery's premises, serve complimentary samples and sell a limited quantity of its own wine at retail. Id. § 2070(3).[5]

> Customers may possess and transport such wine anywhere in the state in quantities not in excess of that allowed by other state law, but such wine must be accompanied by a bill of sale
>
> ...
>
> A Tennessee licensed winery may sell no more than five (5) cases or sixty (60) liters of wine to any single customer in one (1) day. Any other section of the law to the contrary notwithstanding, it shall be legal for any such purchaser to transport within the state of Tennessee any amount which the customer may legally purchase from a Tennessee winery.

Id. §§ 2070(3) & (1).

Tennessee authorizes the Alcoholic Beverage Commission to promulgate regulations, to enforce compliance, and to license retailers, wholesalers, manufacturers of alcoholic beverages, and wineries. Id. § 207(m). Tennessee has made criminal the importation or transportation of wine and other alcoholic beverages from any other State, territory, or country. Id. § 402(a). Common carriers and "other persons" may not bring or carry wine (or other alcohol) into the State, and may not accept delivery or transport of alcohol unless the sender or intended recipient is a licensed manufacturer or wholesaler of alcoholic beverages. Id. § 402(b). Out-of-state wineries interested in marketing their wine in-state must contract with a licensed wholesaler. "No more than one wholesaler may sell such brand in any specified area." Id. § 301(e)(1). Similarly, in-state wineries must sell wine through licensed wholesalers as well, and are prevented from holding wholesalers licenses. Id. § 404(c).

IV. GRANHOLM V. HEALD

In Granholm v. Heald, 544 U.S. 460 (2005), the Supreme Court addressed the issue: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of § 2 of the Twenty-First Amendment?" 541 U. S. 1062 (2004). To answer this question, the Court employed a two-step analysis. First, the Court evaluated whether each of the laws had a discriminatory effect on interstate commerce.

Michigan's law prohibited the direct shipment of wine to consumers by out-of-state wineries but explicitly allowed licensed in-state wineries to direct-ship. Id. at 473-74. The Court described this scheme as "obvious" discrimination. New York's law was less openly restrictive. It permitted in-state wineries to direct-ship to consumers; out-of-state wineries were permitted to direct-ship if they established a branch office and/or warehouse in-state. Id. at 474-75. The Court saw little to distinguish the overt from the subtle, and found "[t]he suggestion of a limited exception for direct shipment from out-of-state wineries does nothing to eliminate the discriminatory nature of New York's regulations." Id. at 474. In both cases, the discriminatory laws ran afoul of the "dormant" Commerce Clause, art. I, § 8, cl. 3. The Court reaffirmed, "State laws that discriminate against interstate commerce face `a virtually per se rule of invalidity.'" Id. at 476 (internal citation omitted). Moreover, the Court affirmed that § 2 of the Twenty-First Amendment,[5] which grants States wide latitude in regulating alcohol, is not an unbridled power. The Court reviewed its "modern" § 2 jurisprudence and found three rules:

> First, the Court has held that state laws that violate other provisions of the Constitution are not saved by the Twenty-First Amendment.... Second, the Court has held that § 2 does not abrogate Congress' Commerce Clause powers with regard to liquor.... Finally, and most relevant to the issue at hand, the Court has held that state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause.

Id. at 486-87. Importantly, the Court stated that the three-tiered system was not necessarily at risk from its holding in Granholm. The Court stated, "[t]he Twenty-First Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." Id. at 488-89.

After determining the Michigan and New York laws were discriminatory and were not saved by the aegis of the Twenty-First Amendment, the Court examined the laws under strict scrutiny to see if they advanced "a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." Id. at 489. The States offered two main justifications: (1) preventing underage drinking and (2) facilitating the collection of liquor tax. Id. at 489-91. The Court rejected each of these arguments, finding there were less-discriminatory policies the States could employ to protect such interests. Thus the Court ruled the Michigan and New York laws were unconstitutional. Id. at 492-93 (holding "[o]ur Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods. The burden is on the State to show that `the discrimination is demonstrably justified.'").

V. DISCUSSION

A. Tennessee's Wine Laws Are Distinguishable From Those Struck Down in Granholm Because the Laws Do Not Discriminate Against Out-of-State Wineries.

Here, Defendants construe Granholm to be a case about shipping. To such end, they argue, "nothing in the

statute or rule, however, authorizes direct shipment of wine to consumers, retailers, or restaurants." (Case No. 2:06-CV-149, Court File No. 3, p. 3, hereinafter "Def.'s Mem."; see also WSWT Resp.12.) Plaintiffs counter with alternative arguments. First, nothing in the law prohibits direct shipment by in-state wineries (Case No. 2:06-CV-149, Court File No. 6, p. 6, hereinafter "Pl.'s Mem."). Second, Granholm is not just about shipping: Granholm is about differential treatment, and here, in-state wineries may sell on-site at retail and out-of-state wineries may not enter the Tennessee market except through a wholesaler (id. at 5). The Court agrees with Plaintiffs, that Granholm applies more broadly than Defendants argue. At the same time, Plaintiff's interpretation is over-broad, and Granholm is inapplicable to these facts.

First, it appears Plaintiffs misread the Alcoholic Beverage Commission Rules, 0100-7-.04. There is no statute in Tennessee which explicitly authorizes or prohibits wineries, in-state or out-of-state, from taking orders online or by phone, fax, or mail from Tennessee consumers. See generally Tenn. Code Ann. Title 57. However, though no statute explicitly authorizes or prohibits the sale, Tennessee law explicitly prohibits the transport of wine into and within the State. Tennessee's strict prohibition is unlike Michigan's or New York's allowance of direct-delivery. See Tenn. Code Ann. § 57-3-402(b) ("No common carrier or other person shall bring or carry into this state for delivery [any alcoholic beverage]") & (c) ("It is unlawful for any person, railroad company, or other common carrier, to transport or accept delivery of alcoholic beverages ... [except to or from those] holding a wholesaler's license."). Tennessee law prohibits importation of wine

into the State except to a licensed wholesaler; it additionally prohibits delivery originating within the State except from a licensed wholesaler. Through this requirement, both in- and out-of-state wineries are forced into the three-tiered system. Out-of-state wineries must consign their wines to a wholesaler to get them lawfully into the State, id. § 402(b), while in-state wineries must consign their wines to a wholesaler since only wholesalers can lawfully arrange transport or delivery, id. § 402(c).

The Supreme Court concluded its analysis in Granholm by noting, "States have broad power to regulate liquor under § 2 of the Twenty-First Amendment." 544 U.S. at 493. Despite this broad power, a State may not discriminate against interstate commerce. The Court held, if a State decided to allow the direct shipment of wine, "it must do so on evenhanded terms." The logical corollary to evenhanded permissiveness is evenhanded restrictiveness - a State may choose to ban direct shipment of wine and require all wineries to operate within the three tiers. See id. at 488-89 (holding § 2 of the Twenty-First Amendment gives States "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system" and "States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system"). In other words, to be constitutional, the ban must simply be nondiscriminatory. See id.; Brown-Forman Distillers Corp. v. N. Y. State Liquor Auth., 476 U.S. 573, 579 (1986) (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)); see also Exxon Corp. v. Gov. of Md., 437 U.S. 117, 126 (1978) (the fact that a state regulation burdens some interstate companies is not, without

more, a Commerce Clause violation); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471-72 (1981) (challenged statute constitutional because it "regulated evenhandedly . . . without regard to whether the [commerce came] from outside the State"). Tennessee has evenhandedly restricted direct shipment. Tennessee's shipping restrictions (Term. Code. Ann. § 573-402) does not facially discriminate against out-of-state wineries in favor of in-state concerns.[7]

B. The Grape and Wine Law Does Not Impermissibly Differentiate Between In-State and Out-of-State Wineries in Violation of the Dormant Commerce Clause.

1. Plaintiffs Are "Ignoring Geography and Mixing Apples with Oranges." Plaintiffs argue, because the Grape and Wine Law contains a limited exception by which instate wineries may sell their product at retail on-site (up to a certain statutory production limit), "in-state wineries may bypass the wholesalers and sell wine directly to consumers. Out-of-state wineries may not." (Pl.'s Mem. 5.) This argument is creative and interesting, but ultimately unpersuasive. The Court has determined Tennessee's laws on the direct-shipping of wine are equally restrictive on in- and out-of-state wineries. The Court concludes there is a significant difference in kind, magnitude, and market, between permitting direct shipment of wine into or within the State and permitting wineries to sell a limited quantity of their wine on-site. Plaintiffs' counsel attempted to make a similar argument in the United States District Court for the District of Delaware, and Chief Judge Sue Robinson arrived at the same conclusion - on-site sales and direct-shipment of wine may, Constitutionally, be

treated separately for purposes of a dormant Commerce Clause analysis:

> [T]he crux of [plaintiffs] argument appears to be... "ignore[] geography and mix[] apples with oranges." Count I of plaintiffs' complaint alleges that certain Delaware laws violate the Commerce Clause by allowing in-state wineries to sell directly to Delaware residents, while out-of-state wineries wishing to do the same are required to go through one or more intermediaries. This misstates what plaintiffs are actually trying to accomplish: they wish to be able to sell and ship wine directly to Delaware residents' homes, a right that is not even afforded to in-state wineries.
>
> Delaware wineries are permitted to sell directly to customers on their premises ... Likewise, [plaintiff out-of-state winery] may sell its wine directly to Delaware residents on its Pennsylvania premises. The key fact in the case at bar is that, under the current statutory scheme, neither in-state nor out-of-state wineries are allowed to deliver wine directly to Delaware residents' homes.... the court finds that both types of wineries are treated the same with respect to direct wine shipments to Delaware residents. Unlike the state statutes that were invalidated by Granholm, "the object and effect" of Delaware's laws are not "to allow in-state wineries to sell wine directly to consumers in that State but to prohibit out-of-state wineries from doing so, or, at the least, to make direct sales impractical from an economic standpoint."

Hurley v. Minner, 2006 WL 2789164, *5-6 (D. Del. Sept. 26, 2006) (emphasis in original); see also Cherry Hills Vineyard, LLC v. Balducci, 2006 WL 2121192, * 8-9 (D. Me. July 27, 2006). As Judge Robinson points out, Plaintiffs conflate two separate ideas. Plaintiffs assert that to access the Tennessee wine market they are required to utilize a licensed wholesaler while Tennessee-based wineries are not. This is simply untrue. To access the Tennessee wine market, in-state wineries must also contract with a wholesaler - under the same statute challenged by Plaintiffs, Tenn. Code Ann. § 57-3-404(a)-(c). The only time at which an in-state winery is arguably advantaged is if a consumer, of any state, travels to the winery and purchases wine there. But it seems the market for on-site wine purchases, requiring the effort (or pleasure) of a trip to the winery, is different in kind and reach from the the convenience-oriented market that would be created and facilitated by a law allowing direct-shipping. Plaintiffs are trying to compare separate markets that need not be compared in a Commerce Clause analysis. See Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298 (1997) ("any notion of discrimination assumes a comparison of similarly situated entities"); Lenscrafters, Inc. v. Robinson, 403 F.3d 798, 804 (6th Cir. 2005).

In Tennessee, an adult consumer is permitted to visit an in-state winery and make retail purchases on-site of the house wine. Tenn. Code Ann. § 2070(1). However, as already addressed, the winery is unable to direct-ship any wine purchased. The consumer is permitted to personally transport a statutorily limited quantity of wine within the State. Id. §§ 207(i) & 401.[8] Similarly a Tennessee resident who visits the Napa Valley is permitted to purchase wine at out-of-state wineries

(Case No. 2:06-CV-149; Court File No. 7, p. 2 n. 1), and may personally transport a limited quantity of such wine back into the State (and, under federal law, ship a limited amount if he is unable to carry it on the airplane). See Tenn. Code Ann. §§ 2070(1) & 401; H.R. 2215, 21st C. Dept of Justice Approp. Auth. Act, Nov. 2, 2002. In short, Plaintiffs have failed to demonstrate that the Grape and Wine Law discriminates against interstate commerce by practical effect, because in- and out-of-state wineries and consumers are generally treated the same and the Law impacts a different market from the market impacted by the laws prohibiting direct-shipping. Lenscrafters, 403 F.3d at 804 (rejecting plaintiff's claims that optometrists and out-of-state optical companies were similarly situated because they competed for the same customers in the same market for retail eyewear).

2. The Grape and Wine Law Does Not "Make a Market" in the Same Manner as the Challenged Statutes in Michigan and New York.

Further, Plaintiffs are comparing apples and oranges when they compare the statutes at issue in Granholm with the statutes at issue here. In Michigan and New York, the direct-shipping exceptions granted tangible rights and privileges to in-state wineries which were withheld from outof-state wineries. The statutes created or opened a direct-shipping market for in-state wine because such wine could be shipped within the State and out-of-state, but competing wine could not be direct-shipped. Michigan and New York opened the entire area of the respective State as a market to their own wineries. Granholm, 544 U.S. at 474-76 (noting that the New York "scheme grants instate wineries access

to the State's consumers on preferential terms" and noting there was a "farm winery license" distinction whereby only in-state wineries could obtain such license, "the license that provides the most direct means of shipping to New York customers"). Tennessee, by prohibiting the shipping component, creates no specially advantageous State market which is then available only to State residents. See also Cherry Hill Vineyard, 2006 WL 2121192 at *8. As WSWT points out, "States do not have a general obligation under the dormant Commerce Clause to ensure that all potential market participants, no matter how geographically remote, have the same economic opportunities as in-state producers." (WWST Resp. 10.) As long as the State does not create the market itself and impermissibly advantage in-state businesses (thereby burdening interstate commerce), some measure of inequality based on nondiscriminatory factors is acceptable. See Tracy, 519 U.S. at 298; see also Granholm, 544 U.S. at 472 (States may not burden out-of-state business to give in-state business a competitive advantage).

3. Tennessee's Wine Regulations Would Likely Pass a Pike Analysis.

The Court need not strictly scrutinize the challenged statutes because the statutes are nondiscriminatory in purpose or even in effect. Neither the State Defendants nor Plaintiffs have briefed the -Pike balancing test, presumably because Plaintiffs believed the Court would apply a strict scrutiny review. It is not wholly clear why the State Defendants failed to offer a justification for Tennessee's regulation of alcoholic beverages. In typical dormant Commerce Clause jurisprudence, if a

statute is found to be nondiscriminatory, "the question becomes whether `the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. '" Pike v. Bruce Church, 397 U.S. 137, 142 (1970). Plaintiffs, as challengers to Tennessee's wine regulation, bear the weight of proving the "burdens placed on interstate commerce outweigh the benefits that accrue to intrastate commerce." Lenscrafters, 403 F.3d at 806 (citing E. Ky. Res. v. Fiscal Ct. of Magoffin County, Ky., 127 F.3d 532, 545 (6th Cir. 1997). The First Circuit has held that a party can waive application of Pike if it bases its constitutional challenge exclusively on the theory that strict scrutiny applies. Alliance of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 35 (1st Cir. 2005) (citing United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (arguments not seasonably made are deemed abandoned). Although the parties have seemingly waived a Pike application, the Court will state for the record that Plaintiffs would likely have a difficult time satisfying Pike scrutiny.

Plaintiffs have identified no specific burden on interstate commerce because Plaintiffs have been trying to compare distinctive markets. Further, there are but twenty-two wineries registered in the State Department of Agriculture's directory, http://www.picktnproducts. org/food/wine.html, and it is likely Plaintiffs would discover the impact on interstate commerce of the on-site retail of wine produced by these twenty-two wineries is de minimis. On the opposing side Tennessee could identify as a "putative local interest" its interest in maintaining State control of wine importation and transportation, a right granted by § 2 of the Twenty -First Amendment and reinforced as legitimate by Granholm, 544 U.S. at 484,

488-89 ("the aim of the Twenty-First Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use").

V. CONCLUSION

Even when construing the complaint and viewing the facts in the light most favorable to Plaintiffs, it appears beyond doubt that Plaintiffs can prove no set of facts in support of their claim which would entitle Plaintiffs to relief. Accordingly, the Court will DENY Plaintiffs' motion for judgment on the pleadings (Court File No. 5). The Court will GRANT Defendants' motion for judgment on the pleadings (Court File No. 2).

An order will enter.

Footnotes

1 Case No. 2:05-CV-181 is the designated "lead" case, and all citations are to its Court File unless otherwise noted.

2 Interestingly, neither Plaintiffs nor the state Defendants made an effort to respond to WSWT's brief.

3 The Court found the State's response to be particularly inadequate in addressing the more substantive issues as it simply (1) restated the Attorney General's Opinion No. 04-010 from 2004, (2) included little citation, and (3) failed to provide a justification for Tennessee's alcoholic beverage restrictions.

4 The Court has not come to this decision lightly, but it appears here Plaintiffs are asking for too much over too little. As explained in this memorandum it seems Plaintiffs are trying to take a small difference in the direct, on-site access of in-state and out-of-state wineries to consumers, and have the Court magnify this difference to find unconstitutional the licensing, residency, tax, penalty, and other provisions of Tennessee's regulatory scheme for alcoholic beverages. As WSWT points out, Plaintiffs request relief disproportionate to the harm they allege (WSWT Resp. 5 n.2).

Additionally, it is the State Legislature's role to adapt its laws to the will of the Tennessee citizenry and the modern market. An indication of the State's willingness to adept to changed circumstances is Senate Bill 1977 (HB 1850), which was introduced on February 15, 2007. The bill "authorizes persons licensed in this state or another state as wine manufacturers ... to ship wine directly to [of age] Tennessee residents" pursuant to a newly created wine direct shipper license. See S.B. 1977, 105th Leg. 1st Sess. (Term. Feb. 15, 2007).

5 Wineries are limited, generally, to selling 20,000 gallons or 20% of their product on-sale at retail. If a winery uses at least 50% Tennessee-grown grapes in making its wine, such winery may sell on its premises above the 20,000 gallon cap. Tenn. Code. Ann. § 2070(6) (amended, added by 2006 Pub. Acts, c. 826, § 1 (eff. June 2, 2006)).

6 "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in

violation of the laws thereof, is hereby prohibited." U.S. Const. amdt. XXI, § 2.

7It should be noted, other courts have found States' wine regulations unconstitutional after Granholm. See, e.g., Action Wholesale Liquors v. Okla. Alcoholic Beverage Laws Enforcement Comm'n, 463 F. Supp. 2d 1294 (W.D. Okla. Nov. 15, 2006) (in-state wineries could direct-ship and sell directly to retailers); Huber Winery v. Wilcher, 2006 WL 2457992 (W.D. Ky. Aug. 21, 2006) (in-state wineries could direct-ship); Costco Wholesale Corp. v. Hoen, 407 F. Supp. 2d 1247 (W.D. Wash. 2005) (in-state wineries could self-distribute). These cases are as distinguishable as Granholm and for the same reasons: they are overturning laws which granted differential treatment, whereas Tennessee's laws were not facially discriminatory. The closest case is Cherry Hill Vineyard, LLC v. Hudgins, 2006 WL 3791986 (W.D. Ky. Dec. 26, 2006). Here, the law permitted direct-shipping by in- and out-of-state wineries of up to two cases, so long as the purchases were made in-person. The district court rejected the in-person requirement as protectionist towards Kentucky wineries. Cherry Hill Vineyard is distinguishable because, as explained below, Tennessee has not made a market available which advantages in-state wineries as compared to out-of-state wineries.

8 The Court recognizes a distinction: Tennessee wineries are authorized to sell five cases of wine to an individual in-state, while Tennessee law limits import from out-of-state to one or three gallons. Tenn. Code Ann. § 57-3-401. If anything, this distinction would have a de minimis impact on interstate commerce. In addition, it is unclear if Tennessee law would permit an

individual to personally carry more than the one gallon limit imposed in § 401; Defendants assert "Tennessee residents may travel to other states and purchase limited quantities of wine directly from out-of-state wineries" (Case No. 2:06-CV-149, Court File No. 7, p.2) (citing Tenn. Code Ann. § 57-3-304.)

Filed 3/30/07
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

Case No. 2:05-CV-181 Chief Judge Curtis L. Collier

FREDERICK JELOVSEK,
Plaintiff,

V.

PHIL BRESDEN, PAUL SUMMERS, and SHARI ELKS,
Defendants,

and

WINE & SPIRITS WHOLESALERS OF TENNESSEE,
Intervenor.

Case No. 2:06-CV-149 Chief Judge Curtis L. Collier

S.L. THOMAS FAMILY WINERY, INC., d/b/a THOMAS FAMILY WINERY, and MARTIN REDISH,
Plaintiffs,

V.

PHIL BRESDEN, PAUL SUMMERS, and SHARI ELKS,
Defendants.

ORDER

For the reasons set forth in the accompanying memorandum, the Court GRANTS the defendants' motion for judgment on the pleadings (Court File No. 2). The Court DENIES the plaintiffs' motion for judgment on the pleadings (Court File No. 5). The Court DISMISSES the plaintiff's claims and DIRECTS the Clerk to CLOSE this case.

SO ORDERED.
/s/
CURTIS L. COLLIER
CHIEF UNITED STATES DISTRICT JUDGE

Nos. 07-5443/5524
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FREDERICK JELOVSEK (07-5443); S.L. THOMAS FAMILY WINERY, INC. dba Thomas Family Winery; MARTIN REDDISH (07-5524),
Plaintiffs-Appellants,

v.

PHIL BREDESEN, in his official capacity as Governor of the State of Tennessee; PAUL SUMMERS, in his official capacity as Attorney General of the State of Tennessee; SHARI ELKS, in her official capacity as Executive Director, Tennessee Alcoholic Beverage Commission,
Defendants - Appellees,

WINE AND SPIRITS WHOLESALERS OF TENNESSEE,
Intervening Defendant - Appellee.

JUDGES: BEFORE: NORRIS, GIBBONS, and GRIFFIN, Circuit Judges.

January 26, 2009, Filed

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for

rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

APPENDIX : Relevant Constitutional and Statutory Provisions

United States Constitution, Article I
Section 8. Powers of Congress
1. ARTICLE I. LEGISLATIVE DEPARTMENT

Section 8. Powers of Congress

The Congress shall have Power

. . .

. . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

United States Constitution,
Amendment XXI. Repeal of Eighteenth Amendment

SECTION. 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SEC. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

27 USC § 122 (Webb-Kenyon Act)
2. Title 27 - INTOXICATING LIQUORS
Chapter 6 - TRANSPORTATION IN INTERSTATE COMMERCE

27 USC § 122. Shipments into States for possession or sale in violation of State law

The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is prohibited.

(Aug. 27, 1935, ch. 740, Sec. 202(b), 49 Stat. 877.)

Tenn. Code Ann. § 57-3-203. Wholesaler's licenses - Qualifications of applicants - Permits - Salespersons - Employees - Fees - Disposition of alcoholic beverages after nonlicensed persons secure title.

(a) . . .

(b) Each applicant for a wholesale license shall pay to the commission a one-time, non-refundable fee in the amount of three hundred dollars ($300) when the application is submitted for review. Such wholesaler's license, however, shall not be issued unless and until there shall be paid to the commission a separate license fee therefor of three thousand dollars ($3,000), and no license shall be issued except to individuals who are citizens of the state of Tennessee and either have been for at least the two (2) years next preceding citizens of the state of Tennessee or have been citizens of the state of Tennessee at any time for at least fifteen (15) consecutive years.

(c) . . .

(d) . . .

(e). . .

(f) A wholesaler's license may, in the discretion of the commission, be issued to a corporation; provided, that no license shall be issued to any corporation unless such corporation meets the following requirements:

(1) All of its capital stock must be owned by individuals who have been residents of Tennessee for not less than five (5) years next preceding or who at any time have been residents of the state of Tennessee for at least fifteen (15) consecutive years, and who have not been convicted within a period of five (5) years preceding acquisition of such stock for violation of either state or United States prohibition

laws or revenue laws relating to intoxicating liquors;

. . .

(3) No stock of any corporation licensed under this subsection shall be transferred to any person who has not been a resident of Tennessee for at least five (5) years next preceding or who at any time has not been a resident of Tennessee for at least fifteen (15) consecutive years.

The commission is hereby authorized to revoke the wholesale license of any corporation which fails to comply with the provisions of this subsection.

(g) Notwithstanding any language contained in subsection (f), the commission, in its discretion, may issue a wholesale license to any corporation which has been domiciled in the state of Tennessee for twenty-five (25) years, and the majority of whose assets are located in the state of Tennessee and all of whose active officers shall be residents of Tennessee. If any officers of such corporation shall have been convicted of any violation of the criminal code or of any violation relating to the enforcement of the liquor laws, no license shall issue.

(h) . . .

(i) No license entitling the holder thereof to sell or deal in alcoholic spirituous beverages at wholesale shall be granted except in respect to premises situated within a municipality having a population of not less than one hundred thousand (100,000) as shown by the federal census of 1960 or any succeeding federal census.

. . .

Tenn. Code Ann. § 57-3-204. Retailer's licenses - Fees - Permits for employees - Permit renewal - Disposition of alcoholic beverages after nonlicensed persons secure title - Sign required - Penalty for failure to comply.

(a) . . .

(b) (1) . . .

(2) A retail license under this section may be issued to individuals who are residents of the state of Tennessee and either have been bona fide residents of the state for at least two (2) years next preceding or who have at any time been residents of the state of Tennessee for at least ten (10) consecutive years.

(3) The commission may, in its discretion, issue such a retail license to a corporation; provided, that no such license shall be issued to any corporation unless such corporation meets the following requirements:

(A) All of its capital stock must be owned by individuals who are residents of the state of Tennessee and either have been residents of the state for at least two (2) years next preceding or who have at any time been residents of the state of Tennessee for at least ten (10) consecutive years;

(B) . . .

(C) No stock of any corporation licensed under this section shall be transferred to any person who is not a

resident of the state of Tennessee and either has not been a resident of the state for at least two (2) years next preceding or who at any time has not been a resident of Tennessee for at least ten (10) consecutive years.

. . .

Tenn. Code Ann. § 57-3-205. Location of retail license restricted.

(a) No license entitling the holder thereof to sell or deal in alcoholic spirituous beverages at retail shall be granted with respect to premises not situated within either a municipality as defined in § 57-3-101 or within a civil district of a county, which district shall have a population of thirty thousand (30,000) persons or more according to the federal census for the year 1950 or any subsequent census, but which civil district shall not have lying either wholly or partially within its boundaries a municipality as defined in § 57-3-101.

(b) This section shall not be construed to apply to any civil district of any county of this state which county has a population of not more than one hundred seventy-eight thousand five hundred (178,500) nor less than one hundred seventy-eight thousand four hundred (178,400) according to the federal census of 1940 or any subsequent federal census.

Tenn. Code Ann. § 57-3-401. Transportation or possession of untaxed alcoholic beverages in quantities of more than three gallons - Penalty.

(a) It is unlawful for any person, firm or corporation, other than a common carrier, to transport, either in

person or through an agent, employee or independent contractor, untaxed alcoholic beverages as defined in § 57-3-101 within, into, through, or from the state of Tennessee, in quantities in excess of three gallons (3 gals.), including either wet or dry counties. It is unlawful for any person, firm, corporation or association to possess untaxed alcoholic beverages as defined in § 57-3-101 in this state in quantities in excess of three gallons (3 gals.) in either wet or dry counties. A violation of this subsection is a Class E felony.

(b) It is unlawful for any person, firm, corporation or association to import, ship or deliver, cause to be imported, shipped or delivered into this state any alcoholic beverages in excess of one gallon (1 gal.) upon which the tax imposed in this chapter has not been paid, or where such is not transported in accordance with § 57-3-402. A violation of this subsection is a Class E felony.

Tenn. Code Ann. §57-3-402. Importation or transportation limited.

(a) It is unlawful, except as permitted in this chapter, for any person to import or transport, or cause to be imported or transported from any other state, territory, or country, into this state, any alcoholic beverages defined in § 57-3-101. This provision shall not apply to alcoholic beverages imported or transported into this state pursuant
to former § 39-17-705(5).

(b) No common carrier or other person shall bring or carry into this state for delivery or use in this state any alcoholic beverages unless the same shall be consigned

to a manufacturer or wholesaler duly licensed under this chapter, or unless the alcoholic beverages shall be consigned to a post exchange, ship's service store, mess, club, commissary, or other agency under the jurisdiction of the department of defense, in which event notice of the shipment shall be given to the commission as required by § 57-3-110.

(c) It is unlawful for any person, railroad company or other common carrier, to transport or accept delivery of alcoholic beverages, consigned to any person except those duly authorized and holding a wholesaler's license. This shall not apply to:

1) Shipments from a duly licensed wholesaler in this state to a retailer duly licensed or to points outside the state;

(2) Alcoholic beverages consigned to a post exchange, ship's service store, club, commissary, or mess, or any other agency under the jurisdiction of the department of defense after notice of such shipment is given to the commission as required by § 57-3-110; or

(3) Alcoholic beverages transported by a licensee pursuant to the rules and regulations of the commission for the purposes of conducting an educational seminar by a business licensed pursuant to § 57-3-204.

(d) Transportation of alcoholic beverages as defined in this chapter, within, into, through or over this state in quantities in excess of three gallons (3 gals.) is permitted only in conformity with this chapter, except in counties wherein the sale of alcoholic beverages has been legalized.

27 USC § 121

1. Title 27 - INTOXICATING LIQUORS

Chapter 6 - TRANSPORTATION IN INTERSTATE COMMERCE

27 USC § 121. State statutes as operative on termination of transportation; original packages

All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

(Aug. 8, 1890, ch. 728, 26 Stat. 313.)

TENNESSEE GENERAL ASSEMBLY FISCAL REVIEW COMMITTEE
FISCAL NOTE
SB 166 - HB 1155 March 26, 2009

SUMMARY OF BILL: Creates a wine direct shipper license to allow a wine manufacturer or supplier licensed in Tennessee or in any other state to ship up to 12 - 9 liter cases of wine per year directly to a Tennessee resident.

ESTIMATED FISCAL IMPACT:

Increase State Revenue - Net Impact - $4,668,200 /General Fund/ FY09-10

Net Impact - $9,516,000 /General Fund/FY10-11 and Subsequent Years $150,000/ABC Fund/FY09-10 $75,000/ABC Fund/FY10-11 and Subsequent Years

Increase State Expenditures - $37,600/One-Time $33,800/Recurring Increase Local Revenue - $1J25,000/FY09-10 $2,280,000/FY10-11 and Subsequent Years

Assumptions:

- A one-time increase in state expenditures of $32,800 for systems changes required by the Department of Revenue.

- A recurring increase in state expenditures of $200 for annual systems changes required by the Department of Revenue.

- The Alcoholic Beverage Commission will require one new administrative assistant to handle the administrative duties associated with the licensing of out of state wineries. The recurring cost for salary and benefits for this position is $33,600. The one-time cost for supplies associated with the position is $4,800.

- Four types of taxes will be impacted by this bill. The excise tax on wine, state sales tax, local sales tax, and the enforcement tax on the sale of alcoholic beverages.

- Wine sales are subject to a $1.21 per gallon excise tax. FY09-10 collections are estimated to be approximately $10,200,000. FY10-11 excise tax collections are estimated to be approximately $10,300,000. FY09-10 state sales tax collections are estimated to be approximately $21,000,000. FY 10-11 state sales tax collections are estimated to be approximately $21,500,000.

- FY09-10 local sales tax collections are estimated to be approximately $7,600,000.

- The provisions of the bill will result in a 30% percent increase in excise, state, and local taxes.

- Because retailers are required by the bill to remit taxes on the total amount of tax due on sales for the calendar year, and the bill takes effect in the middle of a calendar year, first year collections will only reflect sales for half

of one year.

- The increase in excise tax revenue for FY09-10 is estimated to be approximately $1,530,000 ($10,200,000 x 30% x.5 = $1,530,000).

- The increase in excise tax revenue for FY 10-11 and subsequent years is estimated to be approximately $3,090,000 ($10,300,000 x 30% _ $3,090,000).

- The increase in state sales tax revenue for FY09-10 is estimated to be approximately $3,150,000 ($21,000,000 x 30% x.5 = $3,150,000). The increase in state sales tax revenue for FY 10-11 is estimated to be approximately $6,450,000 ($21,500,000 x 30% _ $6,450,000).

- The increase in local sales tax revenue for FY09-10 is estimated to be approximately $1,125,000 ($7,500,000 x 30% x.5 = $1,125,000). The increase in local sales tax revenue for FY 10-11 is estimated to be approximately $2,280,000 ($7,600,000 x 30% _ $2,280,000).

- Current law authorizes a $0.15 per case tax upon the sale of alcoholic beverages sold at wholesale in Tennessee. FY 09-10 collections attributable to wine sales are estimated to be approximately $470,000. FY 10-11 revenue from this tax attributable to wine sales is estimated to be approximately $480,000. Because the provisions of the bill would allow consumers to make retail purchases from out

of state, there is anticipated to be a decline in wholesale sales and subsequent collection of this tax. It is assumed that 50 percent of the revenue generated from this tax is attributable to wine sales. It is further assumed that there would be a five percent decrease in wholesale sales subject to this tax. Therefore, in FY09-10 there is estimated to be a decrease in state revenues of approximately $11,750 ($470,000 x .05 decrease x .5 = $11,750). In FY 10-11 there is estimated to be a decrease in state revenue of approximately $24,000 ($480,000 x.05 = $24,000).

- The bill authorizes a $300 fee for new licensees shipping wine directly to consumers. Assuming 500 new licenses are sold there would be a one-time increase in state revenue of $150,000 (500 x $300 = $150,000) in FY08-09.

- The bill requires a $150 annual renewal fee for licensees shipping wine directly to consumers. Assuming 500 renewals per year in FY0910 and thereafter, the recurring increase in state revenue is estimated to be $75,000 ($150 x 500 = $75,000).

- The net increase in state revenue to the General Fund for FY09-10 is estimated to be approximately $4,668,200 ($1,530,000 + $3,150,000 - $11,800 = $4,668,400).

- The net increase in state revenue to the General Fund for FY 10-11 is estimated to be approximately $9,516,000 ($3,090,000 +

$6,450,000 - $24,000 = $9,516,000).

- The FY09-10 increase in state revenue to the ABC Fund attributable to new licensee fee revenue is estimated to be $150,000.

- The FYI 0-11 and thereafter increases in state revenue to the ABC Fund attributable to licensee renewal are estimated to be $75,000.

- The increase in local government revenue for FY09-10 is estimated to be approximately $1,125,000.

The increase in local government revenue for FY 10-11 and thereafter is estimated to be approximately $2,280,000.

CERTIFICATION:

This is to duly certify that the information contained herein is true and correct to the best of my knowledge.